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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1846

LINCOLN THEODORE PERRY,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC.,
XEROX CORPORATION, and
INDIANA BROADCASTING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 12, 1974, in the case of Lincoln Theodore Perry v. Columbia Broadcasting System, Inc., Xerox Corporation, and Indiana Broadcasting Corporation, affirming the granting of summary judgment entered September 8, 1972, for respondents by the United States District Court for the Southern District of Indiana, Indianapolis Division, the Honorable William E. Steckler, Judge.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court are not yet officially reported. They appear respectively as Appendix A and Appendix B herein.

JURISDICTION

The judgment order of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was entered on March 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sections 1254 (1) and 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. When there is genuine disagreement whether a commentary is "baseless commentary," "editorialization," or "news," is the news media or the jury the final arbiter as to what it is?

2. Is reporting, broadcasting and televising, if arguably dishonest, a protected activity to respondents under the First Amendment to the United States Constitution superior to the right of trial by jury guaranteed to petitioner under the Seventh Amendment to the United States Constitution?

3. Is the presenting of "baseless commentary" as "news" a right guaranteed respondents which is superior to the right of petitioner to his privacy and his personal profile which can be invaded and destroyed by respondents without compensation and without due process of law guaranteed petitioner by the Fifth Amendment to the United States Constitution?

4. Is the guarantee to petitioner of a right to trial by jury under the Seventh Amendment to the United States Constitution a lesser constitutional right than that of his adversaries under the First Amendment so as to confer upon his adversaries the right to be the final arbiters of what is "news" and what is "commentary?"

5. Can the rights guaranteed petitioner under the Fifth and Seventh Amendments to the United States Constitution be disparaged by denying petitioner his rights guaranteed by the Ninth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

1. United States Constitution, Amendment 1:

   "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. United States Constitution, Amendment 5:

   "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. United States Constitution, Amendment 7:

   "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

4. United States Constitution, Amendment 9:

   "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

5. Rule 56 (c), Federal Rules of Civil Procedure:

   "(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered . . . if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

STATEMENT OF THE CASE

I.

The Nature of the Case

This civil action was brought by a petitioner, a black man who was a movie star in the 1930's whose last picture was filmed in 1938. Petitioner complains that respondents under the guise of news and with research in support of their commentary, without regard to actual facts, without notice, made petitioner news against his will and without his consent by catapulting him via 173 stations upon every television screen in 107 cities throughout the 48 continental United States, Alaska, and the Virgin Islands on prime television time presenting petitioner in a manner as to hold him to scorn and ridicule, thereby destroying petitioner's entire career. The Court of Appeals in its opinion admits that a statement which would tend to hold petitioner up to hatred, contempt or ridicule or when it causes him to be shunned or avoided and tends to injure him in his profession, trade or calling is a compensable claim under Indiana law.

Respondents contend that such activity is protected under the First Amendment to the United States Constitution as determined by this court in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967) and *New York Times Company* v. *Sullivan,* 376 U.S. 254, 279-80 (1964) and that respondents and not the jury are the final arbiters of what is "news," what is "baseless commentary," and what is "editorialization."

II.

Proceedings in the Court Below

In the proceedings below, petitioner by appropriate motion before the District Court requested trial by jury which was originally granted and subsequently denied on respondents' motion for summary judgment. The District Court entered summary judgment in favor of respondents from which judgment, petitioner appealed. The Court of Appeals affirmed the summary judgment of the District Court.

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT IN SUPPORT THEREOF

Petitioner respectfully submits the following reasons which justify allowing a writ of certiorari to issue:

This appeal raises the question of whether the news department of the Columbia Broadcasting System ("CBS" herein) has the right to indiscriminately destroy the private and public life of the citizens of this country by presenting and broadcasting prejudicial and baseless commentary as news which issue should be settled by the United States Supreme Court. The issue raised involves a collision of the rights guaranteed respondent under the First Amendment to the United States Constitution and the rights guaranteed petitioner under the Fifth, Seventh and Ninth Amendments to the United States Constitution.

If we are to survive as a republic, there must be a basis for the dissemination of "news" under which the public can determine what is news from that which is not, and whether the jury or CBS is to be the final arbiter on what is news and what is baseless commentary.

In 1937, Orson Welles presented a baseless commentary as news. The broadcast stated that the eastern United States had been invaded by Martians, which was not true. Many Americans, believing it to be news, packed their belongings and attempted to flee, clogging highways, creating chaos, and inflicting injury to the uninformed citizenry. In 1937, as now, the citizens of the United States depend upon the news media to inform them as to what

is "news," what is "commentary," and what is "editorialization." When baselss commentary is dressed up to appear as "news" or is broadcast as "news," a fraud is perpetrated upon the general public for which there is legal redress when it causes an injury to the person who is hit regardless to whom it was aimed.

CBS here helped itself to petitioner's lifelong achievements and did only such research essential to its commentary with callous disregard for the actual facts. CBS used white men who put words in black men's mouths, manufactured, and sold a series entitled "Black History: Lost, Strayed, or Stolen" as "news" and called it "news." It was not televised as a baseless commentary. The show was written, directed and produced by white men who admitted under oath that their comments relative to petitioner were an unidentified commentary presented as fact for the purpose of making their commentary news, whether or not accurate and whether or not it destroyed the entire public and private life of petitioner. If editorialization is to be encouraged by the government, it must be readily identified as editorialization, and the news media must adhere to the equal time rule and extend to the victim equal time to present his case. Petitioner sought, and was denied, equal time by CBS.

The loss of dichotomy, or separation, of news and commentary is more explosive and destructive than any other element in our society today. If petitioner is denied the right to a public trial by jury, a right not only guaranteed by the Seventh Amendment to the United States Constitution, but reinforced by the Ninth Amendment to the United States Constitution as a right not to be disparaged, then his life, liberty, property, and happiness

has been hung in the shadow of history without allowing petitioner his day in court.

If the decision of the District Court is permitted to stand, we will have established a rule that the great mass communication media of the country is now free from having to hire reporters since all they need do is to meet with their creative writers and present commentary as news based *not* on facts but of a world as they wish to see it.

It is a negative result not contemplated by the First Amendment to the United States Constitution which by its nature takes away from the average citizen every purpose, every protection and every right guaranteed by the Ninth Amendment to the United States Constitution.

The case of Lincoln Perry against the news media is as critical and important to the future freedoms of our country as were the issues during Sam Adams' time, which led Sam Adams to risk his life to distribute the truth. In those days it was the government—the English throne —that suppressed the truth about the colonies of people who wanted the right to be themselves. Now, it is the people in the form of a simple black man who want to prevent a great mass communication news media from suppressing the truth about petitioner by presenting baseless commentary as news. When called upon to defend such baseless commentary, CBS defended their case not on the accuracy of their "news" but upon their right to present baseless commentary as "news."

If this Court denies Lincoln Perry his hour on the legal stage guaranteed him by the Seventh Amendment to the United States Constitution, as reinforced by the

Ninth Amendment to the United States Constitution, and allows the news media instead of the jury to determine what is or is not news, then the news media will, by this case, have been given the power to be the judges of all of us, the prosecutor, the jury, and the hangman. The news media will thereby be given the right to determine and report as "news" every line written, every word spoken, and every deed done by the citizens of this country without the protection guaranteed all citizens by the other amendments to the United States Constitution. The confusion, destruction and tragedy resulting will necessarily follow a society that does not separate its news commentary but delegates this enormous responsibility to its news media.

When CBS broadcast to the world that Lincoln Perry, after lying dormant for thirty years, was suddenly news because he was the tradition of the lazy, stupid, crap-shooting, chicken-stealing idiot, was CBS "commenting" or "reporting the news?" Lincoln Perry never played a lazy, stupid, crap-shooting, chicken-stealing idiot, nor would he have played that part if the opportunity were presented to him. In all his forty-three motion pictures, it was never his intention to get the public to laugh at his character, Step-n-fetchit. The character of Step-n-fetchit is universally loved, and is equally well known, with a whiter skin, as Charlie Chaplin, Lou Costello, Stan Laurel, and their names go down through history. As long as there has been a theater, there has been the simple, lovable character so dedicated to the goodness of the heroes and heroines that in spite of his lack of skill and education, he struggles through dire consequences and

ultimately achieves his goal—the goal of serving the ones he loves. Because his character reflected the good traits of us all, we smiled, we loved, we learned, and we laughed with him. When Lincoln Perry came on the scene, the image of all black men was that of thieves and rapists. Lincoln Perry taught the world that black people could love and care, that compassion and understanding were better than violence, and that all mankind struggled with fear and concern. If the white men at CBS who wrote the news had taken the time to see one of Lincoln Perry's pictures, there is an excellent chance the request for this trial would not have been necessary.

If Lincoln Perry's skin had been white, his image in theatrical history would be secure, and so would his ability to continue to earn a living as an entertainer. But, because his skin was black, and because CBS needed a character and person upon whom they could present their commentary as news, his public and private life and his place in history is a shambles.

Lincoln Perry has been denied due process of law and has been robbed by CBS of his right to life, liberty, happiness and his property by CBS's deliberate presenting commentary as "news." This was never the intention of our forefathers—quite to the contrary. The First, Fifth, Seventh and Ninth Amendments to the United States Constitution were all put there to protect the truth and the rights of individuals to be treated equally. Now these same amendments and the power therein must be returned to Lincoln Perry so that, in the pursuit of defending himself, he will be defending all of us, as well as the Constitution of the United States.

The Seventh Circuit in holding that petitioner was not entitled to a trial by jury, ignored the substantive issue sought to be reviewed and did so without any attempt to determine whether the facts of this case met the test of "genuine dispute" as required by Rule 56 of the Federal Rules of Civil Procedure for the support of a summary judgment of a tort claim. The attention of this Honorable Court is directed to the mischief of the opinion of the Court of Appeals which admits at page 4 (Appendix A, page 4) in its opinion that the question was a *jury* question:

> "Furthermore, in the event the jury found a defamatory construction of the words was intended, they would then have to determine whether the intended meaning—that Perry had sold out his race—was true or false. No action would lie if that construction was true."

The Seventh Circuit in its decision, while admitting throughout the opinion that a jury could have found for or against petitioner or respondents, and while admitting that statements which tend to hold petitioner up to hatred, contempt, scorn or ridicule are actionable under Indiana law and a question for the jury, chose to dispose of the matter summarily by way of affirming the summary judgment entered by the District Court.

CONCLUSION

Wherefore, for the reasons hereinabove advanced, petitioner respectfully prays that this Petition for a Writ of Certiorari should be granted, and, upon hearing, that the order of March 12, 1974, of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court, be reversed, and this cause remanded to said Court of Appeals with directions to review the merits of petitioner-plaintiff's appeal; and that petitioner have such other and further relief as this Honorable Court may deem meet.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973

No. 72-1905
LINCOLN THEODORE PERRY,
Plaintiff-Appellant,
v.
COLUMBIA BROADCASTING SYSTEM, INC., XEROX CORPORATION, and INDIANA BROADCASTING CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 70-C-442
Honorable William E. Steckler, Judge.

ARGUED SEPTEMBER 28, 1973 — DECIDED MARCH 12, 1974

Before SWYGERT, *Chief Judge*, O'SULLIVAN, *Senior Circuit Judge*,* and STEVENS, *Circuit Judge*.

SWYGERT, *Chief Judge*. Lincoln Theodore Perry appeals from the district court's grant of summary judgment for the defendants. Perry, an Illinois resident, brought suit against the Columbia Broadcasting System, Inc. (CBS), Xerox Corporation, and Twentieth Century-Fox Film Corporation,[1] all incorporated in New York and doing business in Indiana, and the Indiana Broadcasting Corporation, an Indiana corporation which owned and operated WISH-TV, a television station in Indianapolis. The district court had jurisdiction under 28 U.S.C. § 1332.

Perry is a professional movie star and entertainer nationally known by his stage name, Stepin Fetchit. CBS

* Senior Circuit Judge Clifford O'Sullivan of the Sixth Circuit is sitting by designation.

[1] Twentieth Century-Fox was dismissed from the case on Perry's own motion.

developed and broadcast a series of seven telecasts entitled "Of Black America." The series was broadcast nationally by CBS, sponsored by Xerox, and shown locally on WISH-TV. "Of Black America" dealt with the history, culture, and experience of Negroes in the United States. The first telecast in the series was entitled "Black History: Lost, Stolen, or Strayed" and was broadcast nationally on July 16, 1968 and rebroadcast on July 23, 1968. It is this telecast that is the subject of the litigation.

"Black History: Lost, Stolen, or Strayed" was written by CBS staff and narrated by Bill Cosby, a nationally known black entertainer. According to the district court's findings the telecast "described how badly the Negro had been portrayed in the history books, the movies, and other facets of life in the United States."

In the preface of the segment of the telecast which dealt with the treatment of Negroes in movies, Bill Cosby stated:

> In the past fifty years, 33,000 feature films have been made in the United States, and about 6,000 of them have had parts for black actors. For the most part, the black portraits have been drawn by white writers, white producers, and white directors for a white audience.
>
> Most black parts were the way white Americans wanted them to be. The black male was consistently shown as nobody, nothing. He had no qualities that could be admired by any man, or more particularly, by any woman.

Famous black actors mentioned in the movie segment included Bert Williams, Bill "Bojangles" Robinson, Willie Best, and Perry. The section dealing with Perry included film clips from movies that Perry had made interspersed with the following narrative commentary by Cosby:

> The tradition of the lazy, stupid, crap-shooting, chicken-stealing idiot was popularized by an actor named Lincoln Theodore Monroe Andrew Perry. The cat made two million dollars in five years in the middle thirties. And everyone who ever saw a movie laughed at—Stepin Fetchit.

• • •

> It's too bad he was as good at it as he was. The character he played was planted in a lot of people's heads and they remember it the rest of their lives as clear as an auto accident.
>
> • • •
>
> He played in movies with other actors who were as American as Mom's raspberry jello. If they accepted the stereotype, how wrong could it be?

The thrust of Perry's complaint was that the "[d]efendants, without plaintiff's permission or consent, to use either his real name or take parts out of context, intentionally violated plaintiff's right of privacy and maliciously depicted plaintiff as a tool of the white man who betrayed the members of his race and earned two million dollars portraying Negroes as inferior human beings." The district court after finding no genuine issue on any material fact concluded that there was neither a defamation of Perry nor an invasion of his privacy in the telecast. A second basis for its ruling was the conclusion that defendants had a constitutional right to comment on Perry since he was a public figure involved in issues of public interest and since there was no evidence that the telecast was made with knowledge of falsity or with reckless disregard of the truth.

I

The first question is whether there was defamation. Perry contends that Cosby's statement was false in that he was neither lazy nor stupid, that the characters he portrayed in the movies never shot craps or stole chickens, and that he never made two million dollars during the middle nineteen-thirties. The record shows that, first, Cosby did not say that Perry was lazy or stupid but that the characters he portrayed represented such a "tradition." Second, the commentary did not state that Perry shot craps or stole chickens. Third, Perry was himself responsible for the erroneous two million dollar figure. He fostered the story and allowed it to circulate publicly so that he could be given credit for being a millionaire and also for setting an example that Negroes

are millionaires. He is estopped now to point out its falsity.

Perry also contends that a jury could reasonably have concluded from the narrative that he had been charged with selling out his race by accepting two million dollars for portraying black people as "lazy, stupid, crapshooting, chicken-stealing idiot[s]." Under Indiana law, which controls in this diversity action, a statement may be defamatory when it is such as would tend to hold the plaintiff up to hatred, contempt, or ridicule, or when it causes him to be shunned or avoided or tends to injure him in his profession, trade, or calling. *Prosser* v. *Callis*, 117 Ind. 105, 107-08, 19 N.E. 735, 736 (1889). Under this definition, the charges that Perry sold out the other members of his race would be a defamation.

The defendants deny such a meaning to the words and argue that the "blame for the roles was squarely placed by the telecast upon the whites who wrote, produced and directed them." We agree with the defendants that white directors, producers, and writers were blamed in the telecast for creating the role, but this does not exclude the construction that Perry has placed on the words in issue. We agree that a jury could have found the intended meaning of the commentary was that Perry had sold out his race for money. A different but innocent construction, however, that could reasonably have been drawn was that Perry's excellent character portrayal reinforced the stereotype view that many white persons had of blacks during the nineteen-thirties and that white moviegoers were willing to pay two million dollars for that reinforcement. "If the words [such as here in issue] are capable of two constructions, one of which would be innocent, still it [is] a matter of fact to be determined by the jury, whether they be used in an innocent sense or otherwise." *Waugh* v. *Waugh*, 47 Ind. 580, 585 (1874).

Furthermore, in the event the jury found that a defamatory construction of the words was intended, they would then have to determine whether the intended meaning—that Perry had sold out his race—was true or false. No action would lie if that construction was true.

II

The next question is whether there was an invasion of Perry's privacy. Cosby's commentary dealt with two matters, the character that Perry portrayed in the movies he made and the making of two million dollars for acting in those roles. Perry was not a private citizen; he had been extensively exposed to the public. He began performing in southern minstrel shows, moved to vaudeville, and then in 1925 appeared in the movies. He was in at least thirty-three movies in the 1920's and 1930's. His last picture prior to the alleged invasion of privacy was in 1938. However he continued from 1938 to 1968 in show business entertaining at picture clubs, fairs, radio shows, road shows, night clubs, opera houses, supper clubs, minstrel shows, vaudeville, medicine shows, Broadway shows, and on television. Perry complains that the "Black History" telecast has injured his professional reputation as an actor and caused Muhammed Ali and others to shun him. He also contends that the damage to his professional reputation caused him to lose the television role of "Sanford and Son."

Perry himself summed up his notoriety as Stepin Fetchit in a deposition:

> I became a household word. I elevated the Negro and I became a Hollywood motion picture star, and this was during the time that a Negro couldn't ride in the front of a bus, couldn't go in no white restaurants, in no white hotels. This was north and south, California, and everyplace.

Thus Perry by his own admission was a public figure. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967) (an athletic director); *Cepeda* v. *Cowles Magazines and Broadcasting, Inc.,* 392 F.2d 417 (9th Cir.), *cert. denied,* 393 U.S. 840 (1968), (a professional baseball player); *Time, Inc.* v. *Johnston,* 448 F.2d 378 (4th Cir. 1971) (a professional basketball player turned coach).

A collateral question is whether the commentary, although about a public figure, concerned any element of Perry's private life which might have amounted to an

invasion of privacy. Cosby's comments dealing with the stereotype created by Perry dealt with his public role as an actor, not with his private life. The comments concerning the two million dollars Perry had made in his acting career during the nineteen-thirties did not concern Perry's private life. Perry denied having made that much money and contends that it was erroneous to state otherwise. Perry however cannot complain now of the error since he is the one who initiated that misstatement.

Perry also contends that there was an invasion of his privacy when only excerpts rather than the full length of his movies were shown.[2] Perry agrees that it would not have been an invasion of his privacy to show the whole film. There was no invasion when only a portion of the film was shown. Perry, as we have earlier noted, was a public figure. The subject with which the telecast dealt, the stereotype, and erroneous characterization of Negroes in film, was a matter of public interest.[3] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

Lastly Perry contends that it was an invasion of privacy to comment on his acting role in movies during the 1930's since he had not made a movie since 1938. It is not necessary in this appeal to deal with the question whether a lapse of time will restore a public figure to the status of a private citizen.[4] Perry continued to be a

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[2] Perry's contention here is confused with an argument that there has been a violation of his contract and copyright rights in showing only excerpts from his films. No action was alleged in the complaint on these theories.

[3] After several years of major riots in the ghettoes of the cities, the National Advisory Commission on Civil Disorders was established to investigate the causes of the upheavals. One of the resulting recommendations was to the media to deal with the problem of race relations in this country.

> In short, the news media must find ways of exploring the problems of the Negro and the ghetto more deeply and more meaningfully. To the editors who say "we have run thousands of inches on the ghetto which nobody reads" and to television executives who bemoan scores of underwatched documentaries, we say: find more ways of telling this story, for it is a story you, as journalists, must tell—honestly, realistically, and imaginatively. It is the responsibility of the news media to tell the story of race relations in America, and with notable exceptions, the media have not yet turned to the task with the wisdom, sensitivity, and expertise it demands. Report of National Advisory Commission on Civil Disorders (1968), at p. 384.

[4] Prosser, Torts 827-28 (4th ed. 1971).

public figure at the time of the broadcast. He may not have had the breadth of national fame with which he was earlier associated, but he was still active in show business and was being considered for the star role in a television series as well as for the subject of a movie about his life.

III

The remaining question in this appeal is whether the defendants were privileged in commenting upon Perry's movie roles as Stepin Fetchit and the money that he made for his performances. The district court found that Perry was a public figure and that the issue of the treatment of Negroes in American movies was of interest to the public. As we earlier noted, we agree.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964), the Supreme Court held that the First Amendment's protection of freedom of expression prohibited "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." This standard was later extended to issues of public interest. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), and to comments about public figures. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967).

Perry argues that the *New York Times* standard does not apply in this case since this was not a news program but a show made for profit as well as to foster militancy among blacks. The Supreme Court rejected the commercial argument in the *New York Times* case. The defamation there was a full page advertisement "that the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." 376 U.S. at 266. This proposition is equally applicable to motion pictures. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-02 (1952), and telecasts, *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969). Perry's second point is that the telecast

encouraged "black militancy as a solution to future black problems" and that "[b]lack militancy is not an acceptable solution to either black, white, or mixed jury." Freedom of expression does not mean freedom to express only approved ideas, it means freedom to express *any* idea. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 445." *New York Times Co.* v. *Sullivan*, 376 U.S. at 271.

Perry also contends without authority that even if CBS and WISH are protected by *New York Times*, it does not apply to Xerox which sponsored the telecast. To follow this logic would leave the First Amendment a meaningless phrase in most areas of the media. It would result in advertisers in magazines, newspapers, and television being sued for statements in which they had no hand. The free and robust debate fostered by the Constitution would quickly wither at the hands of censors for advertisers. "The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times Co.* v. *Sullivan*, 376 U.S. at 266.

Finally, Perry argues that there was evidence of actual malice in the production of the telecast. The trial judge made lengthy findings as to the detailed research that went into the production of this television series and found the evidence to be uncontradicted that the defendants had no knowledge of any falsity nor did they act in reckless disregard of the truth. Perry has shown us nothing to refute those findings.

The grant of summary judgment for the defendants is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LINCOLN THEODORE PERRY, *Plaintiff,* v. COLUMBIA BROADCASTING SYSTEM, INC., XEROX CORPORATION, and INDIANA BROADCASTING CORPORATION, *Defendants.*	Cause No. IP 70-C-442

Entry for September 8, 1972
Honorable William E. Steckler, Judge

Comes now the parties by counsel and the oral arguments on the Motions for Summary Judgment are commenced.

Court Grants Motion for Summary Judgment filed by the Defendants.

Court Denies cross Motion for Summary Judgment filed by the Plaintiff.

Court Adjourned.

(Copies to Omitted)

B-2

(Caption Omitted)

JUDGMENT ENTRY

The above-entitled action came before the Court on the "Motion for Summary Judgment of Defendants Columbia Broadcasting Systems, Inc., Xerox Corporation, and Indiana Broadcasting Corporation," filed June 9, 1972, and the "Plaintiff's Cross Motion for Summary Judgment as to Liability," filed August 2, 1972, which by order, were set for hearing and argument on September 8, 1972, at which time plaintiff, by his counsel, and defendants, by their counsel, appeared before the Court and presented argument.

Being duly advised, the Court concludes that the defendants' motion for summary judgment should be, and it is, hereby GRANTED, and that the plaintiff's cross motion for summary judgment as to liability should be, and it is, hereby DENIED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that defendants are entitled to judgment in their favor as a matter of law, and judgment is hereby entered against plaintiff and in favor of defendants.

The costs of this proceedings shall be taxed against the plaintiff.

Dated this 8th day of September, 1972.

/s/ William E. Steckler,
United States District Judge

(Caption Omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT

The Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Lincoln Theodore Perry is a citizen and resident of the State of Illinois and maintains a business address in Indianapolis, Indiana.

2. Defendants Columbia Broadcasting System, Inc. (CBS) and Xerox Corporation are corporations organized under the laws of New York, doing business in Indiana.

3. Defendant Indiana Broadcasting Corporation is a corporation organized under the laws of Indiana, doing business as the owner and operator of WISH-TV in Indianapolis, Indiana.

4. Plaintiff has dismissed Twentieth Century-Fox Film Corporation from this case.

5. The complaint arises out of acts occurring in the Southern District of Indiana. The same acts occurred in many other jurisdictions having affiliates of the CBS Television Network.

6. The matter in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

Relationships Among The Parties

7. Plaintiff is a professional movie actor and entertainer, nationally known by his stage name, "Stepin Fetchit."

8. CBS developed and broadcast on its television network a documentary series of seven telecasts entitled "Of Black America."

9. The first telecast in this series was called "Black History: Lost, Stolen, or Strayed" and referred in part to plaintiff. It is this telecast about which plaintiff complains.

10. Xerox Corporation sponsored the nationwide broadcast of the series, including the telecast of "Black History: Lost, Stolen, or Strayed", but Xerox was not involved in writing or preparing the telecast.

11. Indiana Broadcasting Corporation broadcast the series on WISH-TV, the local station in Indianapolis, but was not involved in development of the telecast.

Content Of The Telecast

12. The "Of Black America" series was broadcast during the summer of 1968, subsequent to the widespread racial disorders of 1967 and earlier summers.

13. The series represented the results of an investigation by CBS News of the background and underlying causes of those racial disorders.

14. "Of Black America" focused on the black experience in America, and particularly on black history and culture.

15. The first telecast in the series, "Black History: Lost, Stolen, or Strayed", was written and produced by members of the CBS News staff and was narrated by Bill Cosby.

16. The telecast described how badly the Negro had been portrayed in the history books, the movies, and other facets of life in the United States.

17. In introducing the segment of the telecast dealing with movies, Bill Cosby said:

> "In the past fifty years, 33,000 feature films have been made in the United States, and about 6,000 of them have had parts for black actors. For the most part, the black portraits have been drawn by white writers, white producers, and white directors for a white audience."
>
> "Most black parts were the way white Americans wanted them to be. The black male was consistently shown as nobody, nothing. He had no qualities that could be admired by any man, or more particularly, by any woman."

18. A portion of the movie segment focused on the roles portrayed by famous black actors, including Bert Williams, Bill "Bojangles" Robinson, Willie Best, and the plaintiff.

19. The script pertaining to the plaintiff consisted of the following commentary:

> "The tradition of the lazy, stupid, crap-shooting, chicken stealing idiot was popularized by an actor named Lincoln Theodore Monroe Andrew Perry. The cat made two million dollars in five years in the middle thirties. And everyone who ever saw a movie laughed at—Stepin Fetchit."

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"It's too bad he was as good at it as he was. The character he played was planted in a lot of people's heads and they remember it the rest of their lives as clear as an auto accident."

• • •

"He played in movies with other actors who were as American as Mom's raspberry jello. If they accepted the stereotype, how wrong could it be?"

20. Following each of the above comments, the documentary contained film clips from movies in which the plaintiff appeared in his typical role. The documentary contained no references to plaintiff, directly or indirectly, except the above.

21. The script is critical of the acting roles created by whites to delight white audiences, but not of the actors themselves. In fact, the commentary portrays the plaintiff as a very fine actor and comedian.

Preparation Of The Telecast

22. The portion of the telecast dealing with plaintiff was prepared, written and produced by Perry Wolff and Andrew Rooney.

23. Perry Wolff was the executive producer of the telecast and as such had full responsibility for its content. Including among his credits "Tour of the White House with Mrs. Kennedy", "The Roots of Freedom", and "Air Power". Mr. Wolff wrote all the script for the telecast of "Black History: Lost, Stolen, or Strayed" except for the portion dealing with old movies. To assist him with the preparation he selected a staff of qualified journalists, including a scholar in black history, Mr. Otto Lindenmeyer.

Mr. Wolff personally reviewed the books and articles used as primary sources for the telecast.

24. Mr. Wolff believed everything in the telecast to be true. He knew of nothing in the telecast that was false, nor was aware of any facts that might indicate it was false.

25. Andrew Rooney assisted Mr. Wolff in producing and writing the telecast. Mr. Rooney is an experienced writer and producer of CBS News documentaries, and has authored books and written articles for Saturday Evening Post, Collier's, Look, Saturday Review of Literature, Esquire and other magazines. Mr. Rooney wrote the section of the script about which plaintiff has complained. He also selected the film segments from old movies used in the telecast. In preparing that section, Mr. Rooney studied several primary sources, including books, articles and old movies, to determine how blacks had been treated on the screen.

26. Mr. Rooney believed everything in the telecast to be true. He knew of nothing in the telecast that was false nor was he aware of any facts that might indicate it was false.

27. Otto Lindenmeyer assisted in research for the telecast of "Black History: Lost, Stolen, or Strayed." He is a scholar of black studies who was involved in the publication of "The Negro Heritage Library", a ten-volume work, and assisted Drs. Ploski and Brown in the publication of "The Negro Almanac."

28. Mr. Lindenmeyer believed everything in the telecast to be true. He knew of nothing in the telecast that was false, nor was he aware of any facts that might indicate it was false.

29. Among the written materials used in preparation for the "Black History: Lost, Stolen, or Strayed" telecast were:

C. Coon, *Origin of Races.*

C. Eric Lincoln, *Color and Group Identity in the United States.*

Carter, *It's Only Make Believe, Crisis Magazine,* (Feb. 1946).

Dworkin, *The New Negro on Screen* (Pts. 1-2), *Progressive Magazine,* November, December, 1960.

F. Raveau, *An Outline of the Role of Color in Adaption Phenomena.*

Film Daily Year Book.

H. Ploski & R. Brown, *The Negro Almanac* (1967).

H. Wagatsuma, *The Social Perception of Skin Color in Japan.*

L. Hughes & M. Meltzer, *Black Magic, A Pictorial History of the Negro in American Entertainment.*

Motion Picture Yearbook.

Newsweek, March 18, 1968 at 93.

New York Journal American, April 30, 1964.

S. Morrison & H. Commager, *The Growth of the American Republic* (1942 ed.)

W. Katz, *Eyewitness: The Negro in American History* (1967).

30. These sources corroborate the statements of the telecast pertaining to plaintiff:

L. Hughes & M. Meltzer, *Black Magic, A Pictorial History of the Negro in American Entertainment,* at p. 305 (1967). "The 'dear Old Southland' beloved by Hollywood was the setting for the pioneer all-Negro film, 'Hearts in Dixie', made by Fox in 1929. Stepin

Fetchit was featured in his lazy, shuffling, no-account Negro routine."

H. Ploski & R. Brown, *The Negro Almanac,* at p. 776 (1967). "The 1930's, when the sound film came into its own, ushered in the commercial exploitation of the Negro in yet another form: as song-and-dance man . . . . At the same time, the myth of the Negro as irrepressible 'rhythm man' was being reinforced—a myth which found its most demeaning expression in the grinning, shuffling, eye-rolling antics of Stepin Fetchit, Manton Moreland and Sleep 'n' Eat, among others."

Carter, *It's Only Make Believe, Crisis Magazine* (Feb. 1946). "One era began with a genuine pride in and favoritism toward the ivory-toothed grins of Little Farina and Sunshine Sammy. This was the period which permitted Stepin-Fetchit to amass and lose a small fortune by portraying all that is repugnant to Negroes in their own makeup."

New York Journal American, April 30, 1964. "Stepin Shuffles Into Charity Bed". Negro comedian Stepin Fetchit, who made about $2 million entertaining movie-goers with his slump-shoulders, foot-shuffling routine, today is a charity patient at Cook County Hospital . . . 'I figure I made $2 million in the movies' he said".

31. The evidence is uncontradicted that defendants, their agents and their employees believed everything in the telecast, including the portion pertaining to plaintiff, to be true and that they had no knowledge of any falsity in the telecast.

32. The evidence is uncontradicted that defendants broadcast "Black History: Lost, Stolen, or Strayed" only

(1) after having employed qualified writers and scholars to prepare the script, (2) after having completed substantial research on the topic, and (3) after verifying their conclusions by resort to primary sources.

33. The evidence is uncontradicted that defendants did not telecast "Black History: Lost, Stolen, or Strayed" with reckless disregard of the truth.

Plaintiff As A Public Figure

34. Plaintiff, age 70, has been a professional entertainer substantially all of his life. He has performed regularly in movies, on stage, radio, and television.

35. Plaintiff's sole occupation was at the time of the telecast and remains to this date that of a professional entertainer and actor.

36. Plaintiff has received nationwide recognition as a Hollywood movie star and entertainer. He is a public figure known to millions of persons.

Plaintiff As Involved
In Issues of Public Interest

37. The Negro and his struggle for equality has been during the last decade and particularly during 1968, the time of the telecast, a matter of intense public interest and concern.

38. The "Of Black America" series was broadcast just subsequent to the publication of the Report of the National Advisory Commission on Civil Disorders. That Commission urged that:

"In short, the news media must find ways of exploring the problems of the Negro and the ghetto more deeply and more meaningfully. To the editors who say 'we have run thousands of inches on the ghetto which nobody reads' and to television executives who bemoan scores of underwatched documentaries, we say: find more ways of telling this story, for it is a story you, as journalists, must tell—honestly, realistically, and imaginatively. It is the responsibility of the news media to tell the story of race relations in America, and with notable exceptions, the media have not yet turned to the task with the wisdom, sensitivity, and expertise it demands." *Report of the National Advisory Commission on Civil Disorders*, p. 384.

39. The "Of Black America" series, including the segment "Black History: Lost, Stolen, or Strayed" concerning plaintiff, dealt with the story of race relations in America and, thus, involved matters of public and general concern.

40. The segment concerning the plaintiff dealt specifically with race relations as portrayed in the movies. The motion picture industry, with its glamour and stars, including the plaintiff, is a continuing matter of public concern and interest.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of the action.

2. There is no evidence that the telecast of "Black History: Lost, Stolen, or Strayed" contains any defamation of the plaintiff.

3. Defendants are entitled to the privilege of fair comment because plaintiff is a public figure involved in issues of public interest.

4. Defendants have a constitutional right to freedom of expression concerning plaintiff as a public figure, and concerning his role in matters of public interest. Such a right means unless plaintiff can prove that the telecast was made with knowledge of its falsity or with reckless disregard of its falsity, then no action for defamation or for invasion of privacy can lie.

5. Despite extensive discovery, there exists no evidence which raises a question of fact that defendants broadcast "Black History: Lost, Stolen, or Strayed" with knowledge of its falsity or with reckless disregard of whether it was false or not.

6. Plaintiff has no right of privacy which entitles him to prevent defendants from commenting on his performance as a professional movie actor.

7. There was nothing in the telecast of "Black History: Lost, Stolen, or Strayed" which constituted invasion of plaintiff's privacy.

8. The pleadings, together with the interrogatories and depositions, show that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

September 8, 1972

/s/ William E. Steckler
United States District Judge